SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No.

JESSE H. DENTON, PETITIONER,

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, THE ILLINOIS CENTRAL RAILROAD COMPANY, AND JIM HUNTER, COLORED, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jesse H. Denton, petitioner, prays that a writ of certiorari issue to review the judgment (R., pp. 224-225) of the Supreme Court of the State of Mississippi, which is the highest court in said State, to the end that the rights and liabilities of the parties may be determined in accordance with the Federal statutes, the United

States postal laws and regulations of 1924, and the decisions of this Honorable Court on the questions involved herein.

Statement.

This case grew out of an injury sustained by petitioner on April 21, 1927 (R., p. 36), while engaged in his duties as a United States Railway mail clerk in a railway postal car which was standing in the passenger station of the respondent, the Yazoo & Mississippi Valley Railroad Company, at Jackson, Mississippi.

The Illinois Central Railroad Company, also respondent herein, owned and controlled the Yazoo & Mississippi Valley Railroad Company (R., p. 32) and maintained for their joint use the passenger station at Jackson, Mississippi (R., p. 32), where large quantities of United States mail was transferred to and from respondents lines of railway (R., p. 35), and furnished porters to transfer mail to and from the postal cars on the Yazoo & Mississippi Valley Railroad Company at Jackson, Mississippi (R., p. 33).

Another respondent herein, Jim Hunter, a porter, whose negligence it is charged caused the injuries to petitioner, was hired and paid by the respondent, the Illinois Central Railroad Company, who alone had the right to discharge him (R., pp. 20-21).

Action was commenced herein on October 22, 1929, in the Circuit Court of Lauderdale County Mississippi, against all of the respondents (defendants below), the petitioner alleging that respondent railroad companies (R., pp. 1-6) were engaged in the transportation of United States mail and employed, in pur-

suance thereto, porters to load, unload, and transfer mail, and that respondent, Jim Hunter, was employed as a porter at Jackson, Mississippi, and while so employed negligently (R., pp. 2-4) threw a bag of mail into the aisle of a postal car, causing the injury complained of by petitioner (R., p. 39).

This action was commenced at the direction of the United States Employees' Compensation Commission under Section 26 of the United States Employees' Compensation Act, approved September 7, 1916 (R., p. 18), to recover damages on account of an injury sustained by Federal employees while engaged in the United States railway mail service.

The respondents each filed pleas to petitioner's declaration in the trial court and the respondent railroad companies set up as one of their numerous defenses Section 1293, paragraph (2), of the United States Postal Laws and Regulations of 1924 (R., p. 14), which is in words and figures as follows:

> "Railroad companies shall furnish the men necessary to handle the mails, to load them into and receive them from the doors of railway post-office cars, and to load and pile the mails in and unload them from storage and baggage cars, under the direction of the transfer clerk or clerk in charge of the car if one is on duty, * * *"

and these regulations were admitted in evidence at the instance of the respondent railroad companies (R., p. 166).

On June 18, 1930, this case was submitted to a jury on the issue joined and the respondent railroad com-

panies were given an instruction embracing (R., p. 198) Section 1293, paragraph (2), of the United States Postal Laws and Regulations of 1924 (*supra*), and the jury returned a verdict in behalf of the petitioner (plaintiff below) in the sum of $12,000.00 (R., p. 204).

On June 19, 1930, motion of respondents to set aside the verdict and judgment rendered against them on June 18, 1930, was overruled, to which action and judgment of the court the defendants excepted (R., p. 208).

On August 19, 1930, the respondents, by proper application, appealed from the judgment of the trial court (R., pp. 208-209) to the Supreme Court of Mississippi (R., pp. 208-209).

On August 27, 1930, respondent Jim Hunter, as principal, executed an appeal bond in the sum of $400.00 obligating himself and his guarantors to satisfy costs of appeal only (R., p. 209).

On August 27, 1930, the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company, principals, executed an appeal bond in the sum of $24,000, wherein they and their guarantors obligated themselves to pay and satisfy the judgment complained of and all costs of appeal in case the judgment below was affirmed (R., p. 209).

On April 13, 1931, the Supreme Court of the State of Mississippi entered a judgment (R., pp. 224-225) reversing the judgment of the trial court in the above-entitled cause as to the respondents, the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company, and affirmed the judgment of the trial court as to Jim Hunter (Opinion cited, 133 South.

ern Reps. 656, April 13, 1931), the court holding "That the status of the porter, Hunter, at the time of his alleged negligent act while loading mail into the post office car was not that of a servant of the appellant railroad companies, is determined by the fact that he was at the time engaged in the business of the government, under the expressly reserved right of the government employees on the car to supervise and control him doing the work" (R., p. 224).

On April 25, 1931, petitioner filed suggestion of errors and motion for rehearing (R., pp. 225-226).

On May 4, 1931, the Supreme Court of Mississippi overruled petitioner's suggestion of errors and motion for rehearing (R., p. 227).

Questions Presented.

(1) The controlling question is whether Jim Hunter, the porter, was a servant of the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company or of the United States Government at the time petitioner Denton received his injuries.

Supplemental Questions.

(*a*) Whether the provisions of Section 1293, paragraph (2), of the United States Postal Laws & Regulations of 1924 changed the status of porters furnished by railroads as a part of their contract with the Government for the transportation of United States mail so that such porter while loading, unloading and transferring United States mail became an employee of the United States Government, thus and thereby relieving the railroads from liability for injuries sustained by

railway postal clerks while engaged in the performance of their duties in railway postal cars on account of the negligent acts of such porters.

(*b*) Whether the services performed by porters employed by railroads in handling United States mail are not a part of the services required to be performed by railroads incident to the transportation of United States Mail.

Reasons for Granting Writ.

(1) The Supreme Court of the State of Mississippi has construed a regulation of an executive department of the United States Government, viz., Section 1293, paragraph (2), (*supra*), United States Postal Laws & Regulations of 1924 to mean that porters in the service of and furnished by the railroads to facilitate the transportation of United States mail are employees of the United States Government while engaged in handling mail, thus and thereby relieving the railroads from the negligent acts of such porters on account of injuries sustained by employees of the United States Government (133 Southern Rep. 656, 1931).

(2) That the decision of the Supreme Court of the State of Mississippi in the above-entitled cause is in conflict with the principle announced by this Honorable Court in the case of Standard Oil Company *v.* Anderson, 212 U. S. 215, 53 L. Ed. 480.

(3) The Supreme Court of Mississippi had decided a Federal question of substance in a way probably not in accord with the applicable decisions of this Court.

(4) The Supreme Court of Mississippi has decided questions of Federal law in a way that is untenable and in conflict with the weight of authority.

For the foregoing reasons it is respectfully submitted that this petition should be granted.

JOHN P. BRAMHALL,
Counsel for Petitioner.

Of Counsel:

JAMES E. McCABE.
J. V. GIPSON.

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BRIEF FOR PETITIONER.

Opinion Below.

The opinion of the Supreme Court of the State of Mississippi was rendered on April 13, 1931, and is incorporated in the record at pages 216-224, and is reported in 133 Southern Rep. 656.

Jurisdiction.

The jurisdiction of this Court rests on 5 U. S. C. A., Section 22 (R. S., Sec. 161); United States Postal Laws

and Regulations of 1924, Section 1286, paragraph (5); Section 1288 and Section 1293, paragraph (2); 39 U. S. C. A., Section 538 (July 28, 1916, c. 261; Sec. 5, subd. 13, 39 Stat. 427); 39 U. S. C. A., Section 541 (July 28, 1916, c. 261; Section 5, subd. 27, 39 Stat. 429).

Statement of Case.

A statement of this case is incorporated in the petition for writ of certiorari, commencing at page 1 thereof.

Questions of Law Involved.

(1) Was Jim Hunter, the porter, a servant of the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company, respondents herein, at the time of the injury complained of?

(2) Was the work performed by Jim Hunter as a porter while handling United States mail a part of the services required of the respondent railroad companies in the transportation of United States mail?

(3) If these questions are answered in the affirmative, it is clear that a writ of certiorari should be granted and the decision of the Supreme Court of Missippi reversed as to the respondents, the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company.

Specifications of Error.

(1) The court below erred in holding that Jim Hunter, a porter in the service of the respondent railroad

companies, was at the time petitioner Denton received his injuries, a servant of the United States Government.

(2) The court below erred in holding that the language used in Section 1293, paragraph (2), of the United States Postal Laws & Regulations of 1924 changed the status of Jim Hunter, the porter, from that of a servant of the respondent railroad companies to that of a servant of the United States Government.

(3) The court below erred in reversing the judgment of the trial court as to the respondents, the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company.

ARGUMENT.

Points and Authorities.

(1) Whose servant was Jim Hunter, the porter, at the time petitioner Denton received his injuries?

Jim Hunter was hired and paid by the Illinois Central Railroad Company (R., p. 33) and by a joint arrangement (R., p. 32) he performed work for both respondent railroad companies as a porter handling baggage, taking care of switches and handling United States mail (R., p. 29).

39 U. S. C. A., Section 538 (Sec. 5, subd. 13, 39 Stat. 427), provides as follows:

> FACILITIES FOR CARRYING AND HANDLING MAILS. —"Railroad companies carrying the mail shall furnish all necessary facilities for caring for and handling them while in their custody, etc."

39 U. S. C. A., Section 541 (Sec. 5, subd. 27, 39 Stat. 429, provides as follows:

> TRANSPORTATION REQUIRED IN MANNER, UNDER CONDITIONS, AND WITH SERVICE PRESCRIBED BY POSTMASTER GENERAL; COMPENSATION THEREFOR.—All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

39 U. S. C. A., Section 538, provides without equivocation, that railroad companies shall furnish all necessary facilities for caring for and handling mail while in their custody, and the services of the porters employed by the railroads for transferring United States mail, as in the instant case, is merely the performance of a part of the duties which are required from railroads by the Federal statutes incident to the transportation of mail.

39 U. S. C. A., Section 541 (Sec. 5, subd. 27, 39 Stat. 429), provides that all railway common carriers are required to transport such mail as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to received fair and reasonable compensation for such transportation and for the service connected therewith.

The foregoing Federal statutes make it mandatory upon every common carrier to transport United States

mail, and it also provides that they shall receive a fair compensation for such transportation and for the service connected therewith. What service, may we ask? The service rendered in transferring mail by porters at railway transfer points, which necessarily must include the loading and unloading of mail by such porters.

These two provisions alone, if no other authority was cited, is compelling, that the work of porters furnished by the railroads in handling United States mail at transfer points is a part of the work encumbent upon the railroads to be performed by them, for which they are paid a fair and reasonable compensation as a service connected with the transportation of United States mail.

5 U. S. C. A., Sec. 22, provides as follows:

> DEPARTMENTAL REGULATIONS.—The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and the preservation of the records, papers and property appertaining to it (R. S., Sec. 161).

This statute has authorized the heads of the executive department of the United States Government to make regulations for their respective departments and, pursuant thereto, the Postoffice Department promulgated, on July 1, 1924, the following postal laws and regulations respecting the transportation and handling of United States mail, viz:

SECTION 1286, Par. 5.—Any person acting for an advantage to himself or another, by authority or consent of the railroad company, and representing in any manner the interests of the company or railroad in its business transaction with the public, will be regarded as the company's agent or representative.

SECTION 1288.—At places where railroad companies are required to take the mails from and deliver them into post offices or postal stations or to transfer them to connecting railroads the persons employed to perform such service are agents of the companies and not employees of the postal service, and need not be sworn; but such persons shall be more than 16 years of age and of suitable intelligence and character. Postmasters shall promptly report any violation of this requirement to the superintendent of Railway Mail Service.

SECTION 1293, Para. (2). Railroad companies shall furnish the men necessary to handle the mails, to load them into and receive them from the doors of railway post-office cars, and to load and pile the mails in and unload them from storage and baggage cars, under the direction of the transfer clerk or clerk in charge of the car if one is on duty, etc.

The three preceding sections of the Postal Regulations are based upon 39 U. S. C. A. 538 (Sec. 5, subd. 13, 39 Stat. 427), and were promulgated for the purpose of carrying into effect the provisions of that statute.

Force and Effect of Regulations as Law.

A regulation of a department, in conformity to a particular Act of Congress, becomes a part of the law and is of as binding force as if incorporated in the body of the law itself. Caha *v.* U. S. (Kan. 1894), 14 S. Ct., Rep. 513, 152 U. S. 221; 38 L. Ed. 415, *Ex parte* Reed (1879), 100 U. S. 13, 25 L. Ed. 538; Wilkins *v.* U. S., 175 U. S. 727, 44 L. Ed. 339.

Judicial Notice of Regulations.

The courts take judicial notice of the regulations of executive departments. *Ex parte* Reed (1879), 100 U. S. 13, 25 L. Ed. 538; Wilkins *v.* U. S., 175 U S. 727, 44 L. Ed. 339.

Acquiescence in Postal Regulations.

Section 1288 (*supra*) of the United States Postal Laws and Regulations of 1924 have been in effect since July 1, 1924, and it has been held that where for a long time a railroad company acquiesced in a postal regulation applicable to contracts and statutes relating to the carrying of mails, such acquiescence will not be disregarded without most persuasive reasons. Great Northern R. Co. *v.* U. S. (Minn. 1916), 236 Fed. 433, 149 C. C. A. 485.

Conclusion.

The Supreme Court of Mississippi in rendering its opinion in the case at bar (R., pp. 216-224) cited Standard Oil Co. *v.* Anderson (212 U. S. 215, 53 L. Ed. 485, as

authority for reversing the judgment of the trial court as to respondents, the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company.

Petitioner contends that the opinion of the Supreme Court of Mississippi in this case (133 S. Rep. 656) is not only in direct conflict, both in letter and spirit, with the opinion of this Honorable Court in Standard Oil Co. *v.* Anderson, *supra,* but is out of harmony with the settled opinions of both the Federal and the State courts on the question involved herein.

It is undisputed that Jim Hunter, the porter, was in the general employment of respondent railroad companies (defendants in the trial court), who selected him, paid him his wages (R., pp. 20-21), and had the right to discharge him for incompetency, misconduct, or for any other reason.

Section 1293, paragraph (2), of the United States Postal Laws & Regulations of 1924 provides that the railroads shall furnish porters for transferring mails, meaning thereby that railroad companies were to furnish the work or human effort that was necessary for the transfer of the mail.

It is true, the porters were required to work under the direction of certain postal employees, they having authority to suggest and point out to such porters the mails to be transferred and the cars into which it was to be loaded or from which it was to be unloaded, but this is not sufficient to suspend the relation of master and servant as between Jim Hunter, the porter, and respondent railroad companies, thereby making him a servant of the United States Government for a few

fleeting moments, during which time petitioner suffered the injuries complained of.

Quoting from the opinion of the Supreme Court of the United States in Standard Oil Co. *v.* Anderson, *supra*, it was said:

> "When one large general work is undertaken by different persons, doing different parts of the same undertaking, there must be cooperation and coordination or there will be chaos. The giving of signals under the corcumstances of this case was not the giving of orders, but of information; and the obedience to those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of master."

In Standard Oil Company *v.* Anderson, 212 U. S. 215, 226, the court quoted at length from Driscoll *v.* Towle, 181 Mass. 416, 63 N. E. 922. The opinion in the Driscoll case was delivered by Chief Justice Holmes, now Mr. Justice Holmes, and we quote the following from this opinion:

> "But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant; more than that is necessary to take him out of the relation established by the only contract which he has made, and to make him a voluntary subject of a new sovereign—as the master sometimes was called in the old books."

The opinion of this Honorable Court in Standard Oil Company *v.* Anderson, *supra*, and the opinion delivered by Chief Justice Holmes in Driscoll *v.* Towle, *supra*, are decisive on the question of master and servant involved in this case.

We therefore respectfully submit that the Supreme Court of the State of Mississippi in the above-entitled cause was in error, and that the writ of certiorari herein sought should be granted.

Respectfully submitted,

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(844)